



GREENWAY CHAMBERS

RECENT WHS APPEAL DECISIONS AND OTHER MATTERS OF INTEREST

MALCOLM SCOTT

INTRODUCTION

1. *Orr v Cobar Management Pty Limited* [2020] NSWCCA 220
2. *SafeWork NSW v BOC Limited* [2020] NSWCA 306
3. *Attorney General v Jamestrong Packaging Australia Pty Limited* [2020] NSWCCA 319
4. Costs

STATED CASE

Section 5AE Criminal Appeal Act

- (1) At any time before the completion of proceedings before the Supreme Court in its summary jurisdiction, the Land and Environment Court in its summary jurisdiction, the District Court in its summary jurisdiction or a Court of Coal Mines Regulation in its summary jurisdiction, the judge hearing the proceedings may, or if requested by the Crown must, submit any question of law arising at or in reference to the proceedings to the Court of Criminal Appeal for determination.
- (2) The Court of Criminal Appeal may make any such order or give any such direction to the court concerned as it thinks fit.

SAFework NSW v BOC LTD [2020] NSWCA 306

JURISDICTIONAL ERROR

Power of the Court of Appeal to exercise a supervisory jurisdiction with regard to an acquittal granted by the District Court.



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SAFework NSW v BOC LTD [2020] NSWCA 306

JURISDICTIONAL ERROR

Supreme Court Act - Section 69

- (1) Where formerly—
- (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
 - (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,
- then, after the commencement of this Act—
- (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
 - (d) shall not issue any such writ, and
 - (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
 - (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.
- ...
- (3) The jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes, if the Court is satisfied that the ultimate determination of a court or tribunal in any proceedings has been made on the basis of an error of law that appears on the face of the record of the proceedings—
- (a) jurisdiction to quash the ultimate determination of the court or tribunal, and
 - (b) if the Court determines that, as a matter of law, only one particular determination should have been made by the court or tribunal, jurisdiction to make such judgment or orders as are required for the purpose of finally determining the proceedings.



A-G v JAMESTRONG PACKAGING AUST PTY LTD [2020]
NSWCCA 319

AMOUNT OF FINE

The very high order of negligence that made this infringement such an objectively serious offence of its kind.



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COSTS

1. Indemnity Costs

- Sections 257A to 257G *Criminal Procedure Act*

2. *EPA v Barnes* [2006] NSWCCA 246



ADMISSIONS UNDER THE EVIDENCE ACT

JOSEPH SIMPSON

OUTLINE

1. What is an admission?
2. Use of admissions under the *Evidence Act*
3. Admissions by someone other than the accused
4. Exclusionary provisions of the *Evidence Act*

WHAT IS AN ADMISSION?

In the Dictionary to the *Evidence Act*:

An "admission" means a "previous representation" that is:

- a) Made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- b) Adverse to the person's interest in the outcome of the proceeding.

A "previous representation" means a representation made otherwise than in the course of giving evidence in the proceeding.



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A “representation” includes:

- a) an express or implied representation (whether oral or in writing),
or
- b) a representation to be inferred from conduct, or
- c) a representation not intended by its maker to be communicated
to or seen by another person, or
- d) a representation that for any reason is not communicated.

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- a) What is conveyed in a representation
 - b) When admissions will be implied:
 - c) When admissions will be inferred from conduct

EXAMPLES OF ADMISSIONS

- a) Representations that are exculpatory on their face, if a prosecutor relies upon them as constituting an implied admission of guilt: *R v Esposito* (1998) 45 NSWLR 442 at 458
- b) Representations that a prosecutor relies on as a deliberate lie: *R v Horton* (1998) 45 NSWLR; *R v Kaddour* [2005] NSWCCA 303
- c) Representations which may amount to implied representations that demonstrate that an accused possessed a state of mind adverse to his or her interests in the outcome of the proceeding: see *Severino v R* [2017] NSWCCA 80 at [70]-[74]

USE OF ADMISSIONS

- a) Relevance (s 55 and 56)
- b) The hearsay rule (s 59 EA)
- c) An exception to the hearsay rule (s 81 EA)
- d) Inclusive of surrounding context (s 81 (2))
- e) Requirement that an admission is first-hand (s 82)

ADMISSIONS IN DOCUMENTS

- a) An admission contained in a document is first-hand (s 82 (1)(b))
- b) Document is defined (Dictionary)
- c) Deeming provision (Part 2, cl 6)
- d) Criminal proceedings adoption is required (s 86)

ADMISSIONS BY THIRD-PARTIES

- a) Defendant companies
- b) An admission is made by a party to proceedings
- c) Deeming provision (s 87)
- d) Authority (s 87(1)(a))
- e) Employees (s 87(1)(b))

EXCLUSIONARY PROVISIONS

EA provisions that may provide a basis for exclusion:

1. Section 84: oppression
2. Section 85: unreliability
3. Section 90: unfairness
4. Section 138: impropriety or illegality



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THE APPLICATION OF THE COMPANION PRINCIPLE IN WORK HEALTH AND SAFETY MATTERS

INGMAR TAYLOR SC

THE COMPANION PRINCIPLE

- It is a fundamental principle that the prosecution is to prove the guilt of an accused person.
- The *companion principle* is that “an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.



THE PRINCIPLE OF LEGALITY

Parliament will be assumed not to have intended to abrogate these fundamental rights unless by express words or necessary implication.



THE REGULATORS' COMPULSION POWERS

- Under s155 of the WHS Act the regulator may, by written notice served on a person, compel that person to give to the regulator information within that person's knowledge.
- Under s171 of the WHS Act an inspector who enters a workplace may require a person at a workplace to answer any questions put by the inspector



USE THAT CAN BE MADE OF THE COMPULSORILY ACQUIRED MATERIAL

Section 172(2):

..the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings...



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THE ISSUE

Can a prosecution be taken against a personal defendant in circumstances where the prosecution has available to it information obtained from the defendant under compulsion (regardless of whether it intends to tender that evidence)?

MCANDREW (NSW DEPARTMENT OF PLANNING AND ENVIRONMENT) V CUMMINGS [2020] NSWDC 590

- Cummings made admissions both within and outside of a s171 interview.
- Section 171 interview contained in PB and provided to expert



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APPLICATION BY CUMMINGS

Application by Cummings to permanently stay proceeding,
relying on companion principle.

This raised two issues:

- a. Does the WHS Act permit disclosure of the defendant's s171 interview and s155 response to persons involved in the prosecution of the defendant?
- b. Given that disclosure has occurred, can the defendant have a fair trial? What measures need to be implemented for the defendant to have a fair trial?



DECISION IN *CUMMINGS* [2020] NSWDC 590

- No relevant unfairness had arisen
- The information that the prosecution had obtained under compulsion was not different or additional to that which the prosecution had obtained *other than* by use of the compulsion powers



AUTHORITIES ON THE COMPANION PRINCIPLE

- Many deal with capacity to use information obtained under compulsion *after* charge (eg X7 proceedings and *Lee v NSW Crime Commission*) where more likely to find companion principle not abrogated
- Common solution: award a temporary stay pending formation of a fresh prosecution team who can conduct a fresh trial who will not have access to the compulsorily acquired material
- ICAC and IBAC legislation found to abrogate companion principle: *Macdonald v R*; *Maitland v R*; and *R v Independent Broad-Based Anti-Corruption Commissioner*

AUTHORITIES THAT SUGGEST COMPANION PRINCIPLE MAY HAVE APPLICATION

Cases where the ATO has used its compulsion powers, and that information has been provided to the prosecutor:

- *R v Leach* [2018] QCA 131
- *Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth)* [2020] NSWCCA 48

DOES THE WHS ACT ABROGATE THE COMPANION PRINCIPLE?

- Section 172: direct use is prohibited, but indirect use is not expressly prevented: cf Commonwealth Act and the extrinsic materials
- The regulators are agencies that both monitor and enforce compliance and conduct prosecutions: ss152, 153 and 230
- Inspectors both obtain information, including under compulsion, assist in the conduct of prosecutions and have the power to commence prosecutions: s160
- Information obtained is to remain confidential, but can be disclosed where necessary for the exercise of a function: s271

THE BETTER VIEW – THE PRINCIPLE IS ABROGATED

- Difficult to contend that once the regulator receives compulsorily obtained information from a natural person, it could no longer exercise its prosecutorial powers
- Rather, better view is that the legislature intended to create a regime where such powers could be exercised by the regulatorinspectors and prosecutions then brought by the regulatorinspector





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QUESTIONS?
